

² 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether appellant met her burden of proof to modify an August 1, 2011 loss of wage-earning capacity (LWEC) determination.

FACTUAL HISTORY

On December 18, 2006 appellant, then a 50-year-old nurse, filed an occupational disease claim (Form CA-2) alleging that she sustained neck and back pain due to factors of her federal employment relative to patient care.³ She noted that she first became aware of her condition and realized its relation to her federal employment on December 14, 2006. OWCP accepted the claim for cervical sprain, sprain of the right shoulder (rotator cuff) and upper arm, calcifying tendinitis of the right shoulder, right shoulder impingement syndrome, and right median nerve lesion. It paid appellant intermittent wage-loss compensation on the supplemental rolls commencing December 16, 2006.

On March 1, 2011 OWCP referred appellant for an impartial medical examination with Dr. David Bundens, a Board-certified orthopedic surgeon, to resolve the conflict in the medical opinion evidence between Dr. Scott M. Fried, a treating osteopathic physician, and Dr. Robert Draper, a second opinion Board-certified orthopedic surgeon, regarding the status of appellant's injury-related conditions and work capacity.

On March 2, 2011 the employing establishment offered appellant a modified licensed practical nurse position. Appellant accepted the job offer on March 9, 2011.

In a report dated March 29, 2011, Dr. Bundens, based on a review of appellant's medical records, the statement of accepted facts, and his physical examination findings, diagnosed cervical strain, right median neuropathy, right rotator cuff sprain and tendinopathy, and right shoulder impingement syndrome. In an attached work capacity evaluation form (Form OWCP-5c) of even date, he provided permanent work restrictions of no reaching above the shoulder, pushing, pulling, lifting no more than five pounds for 8 hours daily, and hourly breaks of 10 minutes.

By decision dated August 1, 2011, OWCP issued an LWEC determination, finding that her actual earnings in her modified licensed practical nurse position met or exceeded the current wages of the job that she held when she was injured.⁴

³ Appellant filed a second Form CA-2 on December 9, 2009 alleging that she sustained bilateral carpal tunnel syndrome and right shoulder pinched nerve due to factors of her federal employment. She noted that she first became aware of her conditions and realized their relation to her federal employment on December 14, 2006. OWCP assigned that claim OWCP File No. xxxxxx067. Appellant's claims have been administratively combined, with the present claim, OWCP File No. xxxxxx093, serving as the master file.

⁴ On October 24, 2011 appellant filed a Form CA-2 alleging that she sustained a cervical sprain with right-sided radiculopathy, right medial neuropathy, and an aggravation of a right rotator cuff tear, due to factors of her federal employment. She noted that she first became aware of her conditions and realized their relation to her federal employment on October 6, 2011. OWCP assigned that claim OWCP File No. xxxxxx523. OWCP has administratively combined OWCP File Nos. xxxxxx523 and xxxxxx067, with the present claim, OWCP File No. xxxxxx093. It designated OWCP File No. xxxxxx093 as the master file number.

A functional capacity evaluation report dated October 28, 2011 noted that appellant became symptomatic on her right side with repetitive and heavy lifting tasks. Recommended work restrictions regarding the upper extremities included occasional light fine manipulation and firm grasping, no repetitive work, avoid frequent firm grasping, fine manipulation, and repetitive tasks; no reaching above the right shoulder, and under 10 pounds of lifting or carrying.

By decision dated October 24, 2014, OWCP found that the evidence from the combined files was insufficient to establish a new occupational disease or that appellant's employment duties had aggravated her accepted conditions. Appellant, through counsel, on October 30, 2014 requested an oral hearing before a representative of OWCP's Branch of Hearings and Review, which was held on March 27, 2015.

By decision dated May 22, 2015, the hearing representative affirmed the denial of the claim, finding that the medical reports of Dr. Fried, a treating Board-certified osteopathic orthopedic surgeon, were insufficient to establish that the accepted conditions had been aggravated by the job duties she performed during the period March 9 to October 9, 2011.

On October 22, 2015 appellant, through counsel appealed to the Board. By decision dated May 26, 2016, the Board remanded the case to OWCP for a determination of whether appellant had established total disability from work due to an aggravation of her accepted conditions such that the August 1, 2011 LWEC should be modified.

On remand, by decision dated September 27, 2017, OWCP denied modification of the August 1, 2011 LWEC determination.

On October 5, 2017 appellant, through counsel, requested an oral hearing before a representative of OWCP Branch of Hearings and Review. A hearing was held on March 13, 2018. By decision dated May 3, 2018, OWCP's hearing representative affirmed OWCP's September 27, 2017 decision, finding that the evidence of record did not establish that the August 1, 2011 LWEC determination should be modified.

On September 25, 2018 appellant, through counsel, appealed to the Board. By decision dated May 29, 2019, the Board set aside the May 3, 2018 decision, finding that the record was incomplete as the March 2, 2011 job offer did not describe the physical requirements of the offered position. The Board remanded the case for OWCP to obtain a written description of the modified position's job duties and physical requirements.

On November 8, 2019 the employing establishment provided OWCP with a copy of the March 2, 2011 modified job offer of an accommodated licensed practical nurse. The job offer noted the work schedule and salary, and referred to an attachment for the job description and physical requirements. The attachment accompanying the job offer was a performance plan and a list of the performance elements/standards for the position. The physical restrictions included no pulling or pushing, or lifting more than five pounds.

By decision dated January 14, 2020, OWCP again denied modification of the August 1, 2011 LWEC determination. On January 23, 2020 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. A hearing was held on April 29, 2020.

By decision dated June 19, 2020 OWCP's hearing representative affirmed OWCP's January 14, 2020 decision, finding that the evidence of record did not establish that the August 1, 2011 LWEC determination should be modified.

LEGAL PRECEDENT

A wage-earning capacity determination is a finding that, a specific amount of earnings, either actual earnings or earnings from a selected position, represents a claimant's ability to earn wages.⁵ Generally, wages actually earned are the best measure of wage-earning capacity and, in the absence of evidence showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure.⁶ A determination regarding whether actual earnings fairly and reasonably represent one's wage-earning capacity should be made only after an employee has worked in a given position for at least 60 days.⁷ Wage-earning capacity may not be based on an odd-lot or make-shift position designed for an employee's particular needs, a temporary position when the position held at the time of injury was permanent, or a position that is seasonal in an area where year-round employment is available.⁸

Compensation payments are based on the wage-earning capacity determination, and it remains undisturbed until properly modified.⁹

Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated, or the original determination was, in fact, erroneous.¹⁰ OWCP's procedures provide that, "[i]f a formal [LWEC] decision has been issued, the rating should be left in place unless the claimant requests resumption of compensation for total wage loss. In this instance the CE [claims examiner] will need to evaluate the request according to the customary criteria for modifying a formal [LWEC]."¹¹ The burden of proof is on the party attempting to show modification.¹² There

⁵ 5 U.S.C. § 8115(a); *see M.J.*, Docket No. 21-0036 (issued August 23, 2021); *O.S.*, Docket No. 19-1149 (issued February 21, 2020); *Mary Jo Colvert*, 45 ECAB 575 (1994); *Keith Hanselman*, 42 ECAB 680 (1991).

⁶ *See M.G.*, Docket No. 19-1659 (issued August 18, 2020); *J.A.*, Docket No. 18-1586 (issued April 9, 2019).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity Based on Actual Wages*, Chapter 2.815.5 (June 2013).

⁸ *See M.S.*, Docket No. 19-0692 (issued November 18, 2019); *James D. Champlain*, 44 ECAB 438, 440-41 (1993); *id.* at Chapter 2.815.5(c) (June 2013).

⁹ *See M.G.*, *supra* note 6; *M.F.*, Docket No. 18-0323 (issued June 25, 2019).

¹⁰ *M.G.*, *id.*; *J.A.*, Docket No. 17-0236 (issued July 17, 2018); *Katherine T. Kreger*, 55 ECAB 633 (2004); *Sue A. Sedgwick*, 45 ECAB 211 (1993).

¹¹ *Supra* note 8 at Chapter 2.812.9(a) (June 2013); *M.G.*, *id.*; *D.T.*, Docket No. 18-0174 (issued August 23, 2019); *J.B.*, Docket No. 17-0817 (issued April 26, 2018); *Harley Sims, Jr.*, 56 ECAB 320 (2005).

¹² *M.G.*, *id.*; *O.H.*, Docket No. 17-0255 (issued January 23, 2018); *Selden H. Swartz*, 55 ECAB 272, 278 (2004); *Darletha Coleman*, 55 ECAB 143 (2003).

is no time limit for appellant to submit a request for modification of a wage-earning capacity determination.¹³

ANALYSIS

The Board finds that appellant has met her burden of proof to modify OWCP's August 1, 2011 LWEC determination.

As OWCP issued a formal LWEC determination, the decision will remain in place unless there is a material change in the nature and extent of the injury-related position, the employee has been retrained or otherwise vocationally rehabilitated, or the original determination was erroneous.

The Board finds that appellant has established that the original determination was erroneous.

In determining whether a modified position represents appellant's wage-earning capacity, OWCP's procedures provide that a detailed description of duties and physical limitations of the position should be of record and the physical limitations of the position should not exceed the injured employee's work tolerances.¹⁴ In a report dated March 29, 2011, Dr. Bundens, an OWCP second opinion, provided permanent work restrictions of no reaching above the shoulder; pushing, pulling, lifting no more than five pounds for eight hours daily, and hourly breaks of 10 minutes. On March 2, 2011 the employing establishment offered appellant a modified job as an accommodated licensed practical nurse with physical restrictions of a five-pound limit for pulling or pushing and lifting. However, the physical restrictions of the March 2, 2011 modified job offer did not include Dr. Bundens restrictions of no reaching above the shoulder or hourly breaks of 10 minutes. The record therefore establishes that the modified position was outside of appellant's work restrictions.¹⁵

Accordingly, appellant has established a basis for modifying the LWEC determination. Upon return of the case record, OWCP shall determine her entitlement to compensation benefits.

CONCLUSION

The Board finds that appellant has met her burden of proof to modify OWCP's August 1, 2011 LWEC determination.

¹³ C.S., Docket No. 19-0660 (issued August 13, 2020); W.W., Docket No. 09-1934 (issued February 24, 2010); Gary L. Moreland, 54 ECAB 638 (2003).

¹⁴ *Supra* note 8.

¹⁵ *Id.*; see also M.J., Docket No. 20-1263 (issued September 14, 2021).

ORDER

IT IS HEREBY ORDERED THAT the June 19, 2020 decision of the Office of Workers' Compensation Programs is reversed.

Issued: January 18, 2022
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Christopher J. Godfrey, Deputy Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board